

*United States Court of Appeals
for the Second Circuit*



**APPELLEE'S
PETITION FOR
REHEARING**

757125

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7125

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PLS

ROBERT A. McAULIFFE,

Plaintiff-Appellee,

v.

ADOLF G. CARLSON, Commissioner
of Finance and Control of the
State of Connecticut,

Defendant-Appellant

Appeal From The United States District Court
For the District Of Connecticut

APPELLEE'S PETITION FOR REHEARING

MICHAEL CHURGIN
STEPHEN WIZNER
DENNIS E. CURTIS
127 Wall Street
New Haven, Connecticut 06520
(203) 436-2210

JACK GREENBERG
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019
(212) 586-8397

Attorneys for Plaintiff-Appellee



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Plaintiff-Appellee hereby petitions the Court
for rehearing and reconsideration of its decision entered
August 1, 1975, in this matter, on the ground that this
Court's holding is inconsistent with certain decisions
of the United States Supreme Court.

This is an action for the return of property un-
constitutionally seized and retained by defendant Carlson.
The Supreme Court has repeatedly held that the Eleventh

Amendment does not bar actions for the return of such property. In Tindal v. Wesley, 167 U.S. 204 (1897) the Supreme Court upheld an action for the return of real property unlawfully seized and held by state officials. In Poindexter v. Greenhow, 114 U.S. 270 (1885) the Court upheld an action for the return of personal property unlawfully seized and held by state officials. See 114 U.S. at 286-291. In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 848-8601 (1824), the Court upheld an action for the return of cash and bank notes unlawfully seized and held by state officials. In each case the Supreme Court reasoned that, since the defendant's action in acquiring and retaining the disputed property was not authorized by any valid state law, the defendant "stands, then, stripped of his official character" and must return the property which he holds as a mere private wrongdoer. Poindexter v. Greenhow, 114 U.S. 270, 288.

The opinion of this Court is grounded on the assertion in Knight v. State of New York, 443 F.2d 415 (2d Cir. 1971) that the Eleventh Amendment bars suits for the return of property. Slip opinion, p. 5343. The panel which decided Knight, due to the "exceedingly unhelpful briefs," 443 F.2d at 418, was clearly unaware of the decisions of the Supreme Court to the contrary in Tindal, Osborn and Poindexter, and did not know that another panel in this circuit had recognized and followed these decisions. Banco De Espana v. Federal Reserve Bank, 114 F.2d 438, 447 (2d Cir. 1940). The court in Knight

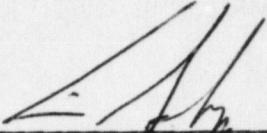
concluded that the decision as to whether the Eleventh Amendment bars suits for the return of property "is better left to the only body that can speak with authority," the Supreme Court. 443 F.2d at 421. That Court has already spoken, and the holding of Knight to the contrary is clearly erroneous.

The difference between return of unlawfully taken property and an ordinary claim for damages is controlling. The judgment awarded below need not be paid out of "state funds" or the "general revenues," it can and should be paid out of the funds illegally taken from plaintiff by defendant. The fact that the defendant may have comingled plaintiff's funds with the state's own funds cannot confer upon the former the special immunity accorded solely to the latter.

Neither Edelman v. Jordan, 415 U.S. 651 (1974) nor Ford Motor Co. v. Department of the Treasury, 323 U.S. 459 (1945), purport to overrule the earlier decisions in Osborn, Poindexter and Tindal. Ford merely affirmed the Court's decision a year earlier in Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944), and Great Northern had expressly confirmed the correctness and vitality of Tindal and Poindexter. 322 U.S. at 50-51. Edelman, unlike the instant case, would in fact have required the expenditure of state revenues.

For these reasons the Court should grant
rehearing and upon rehearing should affirm the
decision of the District Court.

Respectfully submitted,

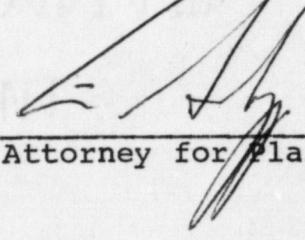

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Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 1975, I served two copies of the foregoing Appellee's Petition for Rehearing upon counsel for Defendant-Appellant, by depositing them in the United States Mail, first class postage prepaid, addressed to Maurice Myrun, Assistant Attorney General, 90 Brainard Road, Hartford, Connecticut 06115.



Attorney for Plaintiff-Appellee

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